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Report on the Working Group on cross-border cartels

UNCTAD Secretariat Note



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Report of the Working Group on Cross Border Cartels to the IGE 2021

A. Background

1. The Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UNRC) called upon Member States to facilitate international cooperation among competition authorities in order to strengthen the effectiveness and efficiency of law enforcement against cross-border anticompetitive business practices (with a focus on cross-border cartels), in accordance with section F of the Set and decided to establish a working group on cross-border cartels (WG) to highlight best practices, facilitate information exchange and consultations and report to the nineteenth session of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy in July 2021.
2. The WG opens to Member States' Competition Authorities representatives and other relevant stakeholders such as representatives of international organizations and networks, of academia, of civil society organizations and practitioners.

B. Experience and insight gained so far

3. The WG held its first virtual meeting on 4 February and participants suggested the following topics to be discussed in the WG: i) Sharing best practices on combatting cross-border cartels such as method of information exchange and investigations involving many developing competition authorities; ii) Combatting cross-border cartels in the digital sector; iii) Focusing on enforcement issues for small & new agencies; iv) Convergence of leniency programs; v) Sharing experience from investigated parties' perspectives such as procedural fairness; vi) Sanctions useful in cross-border cartel enforcement; vii) Assessing impact of cross-border cartels on consumers, in particular, vulnerable consumers.
4. Since the first kick-off meeting, the WG held two more substantive meetings on 13 April and 1 June, respectively. The Second virtual meeting on 13 April 2021 consisted of two sets of presentations from Latin America (Chile and Peru) and Africa (South Africa and Zambia) respectively. In the third meeting on 1 June 2021, the Eurasian Economic Commission (EEC) and Indonesia respectively presented their cross-border cartel cases. The two meetings identified different aspects and challenges related to cross-border cartels with a special focus on developing countries and discussed how to address those challenges and future work for effective cross-border cartel sanctions.



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5. In the first kick-off meeting, the Russian Federation suggested having at least four or five WG meetings per year to delve into the various topics and requested the Secretariat to renew the mandates of the WG every year given the fact that the WG was established by the resolution of UNRC which covers the next 5 years. In the third meeting, participants expressed their views on future work of the WG as follows: i) creating global standards of handling cross border cartels; ii) discussing practical ways forward of cooperation (in practical terms) on cases; iii) holding more break-out sessions to discuss cases in practical terms; iv) discussing whether there are specific regional trends on addressing international cooperation; v) focusing more on advocacy efforts on what we are learning from these meetings. The WG will report to the 19th session of the IGE on Wednesday, 7 July 2021 and hear from member States about the WG's functioning, mandate, and future work.

C. Challenges and suggestions for future work

6. The WG has raised numerous issues through case studies from the five regions: informal/formal cooperation, cooperation with other public authorities in a CBC case, leniency, waivers, regional cross border cooperation and trust. These topics are very relevant for developing countries.
7. The case studies presented by Peru, Chile and South Africa demonstrated that waiver is a key tool for cooperation. Therefore, having a waiver friendly environment is paramount for younger agencies combined with trust building exercises. Absence of Leniency can be an obstacle for many younger and developing agencies because it requires at first a buy in from the private sector, compliance with international standards, clear procedures and policies which are similar with neighboring countries. The case study from the EAEU revealed an importance of strong legal grounds for successful investigation of cross border cartels. Cooperation and trust are essential between agencies. Therefore, it is paramount for members to work together on compliance to achieve more cooperation and trust building.
8. Thanks to a survey tool used during the sessions, participants from the WG expressed their satisfaction at delving into practical case studies and also made some recommendations about the next steps of the WG.
9. The Russian Federation noted that the Working Group is an important space to discuss specific cases which demonstrates the importance of international cooperation when CBC are investigated. The Russian representative stated that practices should be aligned, and that one objective of the working group should develop an international document to spell out cooperation best practices in combatting CBCs. Such global standards could be developed in collaboration with



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the BRICS Competition Law and Policy Center whose empirical research shows that out of 47 respondents, 29 are supporting the creating of such global standards.

10. This demonstrates demands from developing countries to move towards this objective. Indonesia concluded by highlighting that the different in structure across the various legal systems can hinder cooperation and therefore concrete steps and guidance would be welcomed to support developing countries. Based on the survey, participants found this session useful in bringing forward practical case studies. Some participants recommended to use more interactive tools such as break out rooms, to discuss practical ways forward by looking at regional trends in addressing international cooperation and to carry out more advocacy work about the outcome of the working group's sessions.
11. The United States representative commented that the Guiding Policies and Procedures (GPP) under Section F, which was adopted by member States in October 2020, are still relatively new and that the proposal for future work of the working group should discussed at the July IGE session.

D. Recommendations

12. Based on the feedback form the WB's participants, the following recommendations can be made. First, the lessons learnt from the practical case studies and active ensuing discussions should be disseminated through advocacy work. This might bring more attention to the role of the WG. Second, participants have called for more concrete and practical guidance and recommendations. At the IGE session on July 7th, 2021, member states will discuss the best way forward.
13. Some proposals include the drafting of international standards. This area of work is based on keen interest from participants of the WB as well as non-participants. Further advocacy work should be carried out to disseminate and raise awareness of the newly implemented GPP, notably through case studies and practical guidelines.